85-458

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

RONALD A. SCHIAVONE AND THE SCHIAVONE CONSTRUCTION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MONROE H. FREEDMAN
Law Building
1000 Fulton Avenue
Hempstead, NY 11550
(516) 621-0132

9 pp

Questions Presented for Review.

Whether Petitioners have standing to request the District Court, in its discretion, to appoint a special prosecutor when:

(1) Petitioners have suffered injury in fact as the victims of perjury and related offenses committed by a government informer and witness;

(2) federal prosecutors vouched for the perjurer's reliability and credibility with respect to his false allegations against Petitioners;

(3) because of its past and continuing involvement with the perjurer as a witness and informer, the prosecutor's office is disabled by a conflict of interest from proceeding with regard to his perjury; and

(4) conviction of the perjurer would help to restore the petitioners-victims' reputations, which have been damaged by his perjury.

List of all Parties to the Proceeding.

The parties to the proceeding in the United States Court of Appeals for the Second Cirucuit were the United States of America, Appellee, and Ronald A. Schiavone and the Schiavone Construction Company,* Appellants.

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*The parent company of Schiavone Construction Company is Schiavone Holding Corp. The following are companies that are subsidiaries of or related to Schiavone Construction Company: Scientific Energy & Recycling Co.; R.L.M., Inc. DBA All Service; Arcadia Corp.; Parapet Constructors.

The following are companies that are currently affiliated with Schiavone Construction Company as partners in joint ventures: Daidone Electric, Inc.; Daidone Electric of New York, Inc.; Fitzpatrick Construction Limited; Franki Foundation Company; Impresit Girola Lodigiani, Inc.; J.A. Jones Construction Co.; Modern Continental Construction Co., Inc.; Nab Construction Corp.; North Star Electrical Contracting Corp.; Perini Corporation; Petro Concrete Structures; Phillips & Jordan, Inc.; Raymond International Builders, Inc.; Roman Asphalt Corp.; Salgado Eastern Corporation; Santop Construction Co.; Schuyler Long Beach Incinerator Corp.; Thomas Crimmins Contracting Co.; Western Foundation Corp.; Worth Engineering.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

RONALD A. SCHIAVONE and the SCHIAVONE CONSTRUCTION COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Reports of Opinions in the Courts Below.

The opinion in the United States Court of Appeals for the Second Circuit is reported in ____F.2d____ (1985), and is reproduced in the appendix to this brief at page 1a. The opinion in the United States District Court for the Eastern District of New York is reported in 596 F.Supp. 1465 (1984), and is reproduced in the appendix to this brief at page 13a.

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on June 24, 1985. The jurisdiction of this Court to review that judgment by writ of certiorari is conferred by 28 U.S.C. §1254(1).

Constitutional Provision and Rule Involved.

Article III, section 2, paragraph 1:

> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Federal Rules of Criminal Procedure, Rule 42(b):

> (b) **Disposition upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts con-

stituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Statement of the Case.

This case arises out of an Application requesting the United States District Court for the Eastern District of New York, in its discretion, to appoint a member of the Bar of the Court to serve as independent counsel to determine whether a government informant and witness, Mario Montuoro, committed perjury and contempt of court before a federal grand jury, and to prosecute Montuoro for any violation of federal criminal law as might be warranted. The District Court had jurisdiction under 28 U.S.C. §1331(a).

The Application was supported by the affidavits of six highly qualified experts on lawyers' ethics: David T. Austern;[1] Barbara Allen Babcock;[2] Samuel Dash;[3] Geoffrey C. Hazard, Jr.;[4] Norman Lefstein;[5] and James P.

[1]App. 31a, *infra.*
[2]App. 35a, *infra.*
[3]App. 39a, *infra.*
[4]App. 44a, *infra.*
[5]App. 47a, *infra.*

Manak.[6] Each of the experts concluded that (a) the Department of Justice is disabled by a conflict of interest from exercising discretion regarding prosecution of Mario Montuoro, and (b) the appropriate remedy is for the District Court to exercise its discretion to appoint independent counsel.

The government did not impeach the applicants' experts, contravene their testimony through experts of its own, or make any other factual record with regard to the conflict of interest, nor did the government cite any cases or other authorities contrary to the experts' opinions that the Justice Department has a conflict of interest regarding Montuoro.

The government's informant and witness, Mario Montuoro, has a criminal record which includes four arrests, one for possession of heroin (1969) and one for possession of a gun (1974).[7] For at least four or five years Montuoro also has had an established relationship with the prosecutors' office as an informer and witness.[8] In 1981, Montuoro was a prosecution witness in *United States v. Sanzo,* an organized crime case in which the defendant was convicted.[9] Montuoro's cooperation with the Department of Justice might have been motivated by a desire to ingratiate himself with the prosecutors' office, and thereby mitigate his difficulties with the law, or from a desire for revenge against people about whom he has given information.[10]

Petitioners' Application for Appointment of Independent Counsel stems from false information Montuoro originally gave to federal agents, including members of the Federal Organized Crime Strike Force in Brooklyn, regarding Raymond J. Donovan and Ronald A.

[6]App. 52a, *infra.*
[7]Ct. of Appeals App. 54, 61.
[8]Ct. of Appeals App. 54, 62.
[9]*Ibid.*
[10]Ct. of Appeals App. 55, 61.

Schiavone. Montuoro falsely alleged that Messrs. Donovan and Schiavone, as officers of Schiavone Construction Company, were guilty of making an illegal cash payment to a union officer. According to Montuoro, the illegal payment took place at a luncheon at Prudenti's Restaurant in Long Island City in May or June of 1977, and he fabricated elaborate corroborative detail in support of his story.[11]

In forwarding Montuoro's false allegations to their superiors in Washington, federal prosecutors vouched for Montuoro's reliability and credibility.[12]

Raymond J. Donovan became Secretary of Labor of the United States in 1981. Later the same year, a division of the United States Court of Appeals for the District of Columbia Circuit appointed Leon Silverman, Esquire, to be Special Prosecutor. Mr. Silverman's express charge was to investigate Montuoro's allegation about an illegal payment during a luncheon at Prudenti's.[13]

Under an order of the court below, issued at the request of the Special Prosecutor, Montuoro testified before a grand jury, and repeated his false story about a luncheon at Prudenti's at which, he said, an illegal payment was made to a union officer on behalf of Schiavone Construction Company.[14] The grand jury unanimously returned a no true bill on the allegation.[15]

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[11]Ct. of Appeals App. 55, 60, 72-74.

[12]Ct. of Appeals App. 62.

[13]Ct. of Appeals App. 55-64.

[14]Ct. of Appeals App. 56. That inference is supported by the Special Prosecutor's exhaustive efforts to test the truth of Montuoro's story. If Montuoro had admitted its falsity before the grand jury, that presumably would have ended the matter.

[15]Ct. of Appeals App. 56.

The Special Prosecutor conducted an exhaustive investigation of Montuoro's story, and established that not a single element of Montuoro's allegations could withstand scrutiny. Montuoro's specifications of dates were "inconsistent," and his attempts to corroborate the Prudenti's luncheon by reference to other events "proved to be illusory." Indeed, the Special Prosecutor found that there is no evidence whatsoever to corroborate Montuoro's assertion that any Prudenti's lunch attended by Messrs. Donovan, Schiavone, Montuoro, and others occurred at or near the time alleged, or for that matter, at any other relevant time.[16] In short, the Special Prosecutor concluded that "no credible evidence exists that a luncheon as alleged by Montuoro ever occurred."[17]

There is, therefore, the strongest probable cause to believe that Montuoro committed several Federal crimes, including Perjury (18 U.S.C. 1621), False Declaration before a Grand Jury (18 U.S.C. 1623), False Statements (18 U.S.C. 1001), Obstruction of Justice (18 U.S.C. 1505), and Contempt (18 U.S.C. 401).

Appellant Ronald A. Schiavone is a victim of Montuoro's false testimony. Mr. Schiavone holds two degrees from Dartmouth College, is a member of the Board of Overseers of the School of Engineering at Dartmouth College, and has been a officer of national and state professional engineering associations.[18] He and his company have been severely affected, both in reputation and financially, by Montuoro's allegations contributing felonious conduct to them.[19] Accordingly, in an effort to demonstrate that he and his company have been wrongly accused

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[16]Ct. of Appeals App. 56, 85-86.
[17]Ct. of Appeals App. 56, 68-69.
[18]Ct. of Appeals App. 87-88.
[19]Ct. of Apeals App. 57, 89.

by a government informer and witness, Ronald Schiavone formally requested the Department of Justice to investigate Montuoro's criminal conduct and to initiate appropriate proceedings against him.[20] Without any explanation, however, the Department of Justice has failed to proceed against Montuoro.[21]

Because the Department of Justice is disabled by a conflict of interest from taking action with respect to Montuoro, Ronald Schiavone and his company petitioned the District Court to appoint independent counsel to investigate Montuoro's crimes and to take whatever actions may be appropriate.

Without exercising its discretion on the merits, the District Court denied the Application.[22] In doing so, the Court accepted the postulate that the Department of Justice has a conflict of interest with regard to Montuoro.[23] The Court held however, that it lacks supervisory, inherent, or ancillary power to appoint independent counsel even on the premise that the prosecutors' office is disqualified to act because of its conflict of interest.[24] The District Court also held that it lacks discretionary power to appoint independent counsel under Fed.R.Cr.P. 42(b), even if Montuoro is in criminal contempt of the District Court's order that he testify truthfully before the grand jury.[25]

Thus, the District Court did not exercise discretion either to grant or deny Petitioners' request. The District Court also declined to rule on the government's contention that Petitioners lack standing.[26]

[20]Ct. of Appeals App. 57.
[21]*Ibid.*
[22]App.13a, *infra;* 596 F.Supp. 1465 (1984).
[23]App. 17a, *infra*; 596 F.Supp at 1467.
[24]App. 17a, *et seq., infra*; 596, F.Supp. at 1467 *et seq.*
[25]App. 20a-21a, *infra*; 596 F.Supp. at 1468-1469.
[26]App. 29a, *infra;* 596 F.Supp. at 1472.

The Court of Appeals vacated the order of the District Court denying the Application but dismissed the proceeding on the ground that Petitioners lack standing to request the District Court, in its discretion, to appoint special counsel.

Petitioners now seek reversal of the decision of the Court of Appeals regarding standing. In that event, the Court of Appeals could decide whether the District Court has the power to exercise its discretion regarding the appointment of special counsel on the facts of this case. If the Court of Appeals were to decide that the District Court has discretion, the District Court could then decide whether to grant or deny Petitioners' Application on its merits.

ARGUMENT

The Court of Appeals misapplied *Linda R. S. v. Richard D.* and *Leeke v. Timmerman* in holding that Petitioners lack standing.

Petitioners do not disagree with the abstract discussion of standing in the opinion of the Court of Appeals.[27] However, when the Court of Appeals turned to "Supreme Court cases that have applied these factors in the same area of the law as that now under consideration," it focused principally upon *Linda R. S. v. Richard D.*, 410 U. S. 614 (1973), and *Leeke v. Timmerman*, 454 U. S. 83 (1981).[28] In analyzing those cases, the court failed to appreciate significant distinguishing factors that should require a different result in this case.

[27] App. 5a-7a, *infra*.

[28] App. 7a-9a, *infra*.

The present case therefore presents this Court with the opportunity to clarify an important aspect of standing, with particular reference to the closely divided decision in *Linda R. S. v. Richard D.*

A. In this case, unlike *Linda R. S.* and *Leeke*, the prosecutors' office is disabled by a conflict of interest.

A fundamental premise of Petitioners' Application is that the prosecutors' office is disabled by a conflict of interest from exercising prosecutorial discretion with regard to Montuoro's perjury against Petitioners. The District Court therefore has discretionary power to fill the vacancy caused by the conflict of interest.

Prosecutors are subject to the professional rules of ethical conduct that govern all lawyers.[29] Federal courts therefore have the duty to enforce ethical standards against federal prosecutors[30] by setting "the bounds of permissible prosecutorial conduct."[31]

There are two sources of standards relating specifically to prosecutorial conduct that have received authoritative professional approval, and both of them disqualify a prosecutor from acting when burdened by a conflict of interest. The ABA *Standards Relating to the Prosecution Function* 3-1.2 says: "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties." Similarly, the *National Prosecution*

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[29] *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983); *United States v. Hogan*, 712 F.2d 757, 758 (2d Cir. 1983).

[30] *United States v. Modica*, 663 F.2d 1173, 1185, n.9 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).

[31] *United States v. Tantalo*, 680 F.2d 903, 909 (2d Cir. 1982); *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976), *cert. denied sub nom. Carter v. United States*, 429 U.S. 980 (1976), *cert. denied sub nom. Bates v. United States*, 429 U.S. 1066 (1977), *cert. denied sub nom. Darby v. United States*, 429 U.S. 1051 (1977), *cert. denied sub nom. Cameron v. United States*, 430 U.S. 982 (1977).

Standards, Standard 3.2, promulgated by the National District Attorneys Association, requires that prosecutors avoid either "recognizable or potential conflicts of interest."

The prosecutors' conflict of interest in the present case derives from their close working relationship with Mario Montuoro as an informant and witness over a period of years. Therefore, despite strong probable cause that Montuoro has committed perjury and other federal felonies against Petitioners,[32] the prosecutors' office has declined to act in his case.[33]

The existence of a disabling conflict of interest on the part of the prosecutors' office is established in the record of this case by the uncontroverted opinions of six experts on lawyers' professional responsiblities.[34] The qualifications of those experts include expertise in drafting and interpreting standards of professional conduct, teaching and scholarship in the fields of criminal procedure and lawyers' ethics, and practical experience in criminal law.

David T. Austern was a Federal prosecutor (Chief of Grand Jury/Intake Unit and Chief of Felony Trials), a New York County prosecutor (Rackets Bureau), and Bar Counsel for the District of Columbia Board on Professional Responsiblity. He recently served as court-appointed Special Prosecutor (with Jacob Stein) in the In-

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[32] See Statement of the Case, *supra*, pp. 5-6. The government has not challenged the existence of probable cause regarding Montuoro's crimes. As stated by counsel for the government in the District Court: "The United States takes no position whatsoever on the issue of whether Mario Montuoro committed any crime including perjury when he testified before the Grand Jury." Hearing, Oct. 26, 1984, District Court Docket Entry No. 11, p. 35.

[33] See Statement of the Case, *supra*, p. 7.

[34] App. 31a-58a, *infra*.

vestigation of the Appointment of Edwin Meese To Be Attorney General.[35]

Barbara Allen Babcock was Assistant Attorney General of the United States, Director of the Public Defender Service of the District of Columbia, and a member of the ABA's Criminal Justice Council. She is now a Professor at Stanford Law School, where she teaches Criminal Procedure and Professional Responsibility.[36]

Samuel Dash was Chief Counsel for the Senate Watergate Committee, District Attorney for Philadelphia, a Special Consultant to the Advisory Committee on the ABA *Standards Relating to the Defense and Prosecution Functions,* and Chairman of the ABA Section on Criminal Law. He is now a Professor at Georgetown Law School, where he teaches Criminal Law, Criminal Procedure, and Professional Responsibility.[37]

Geoffrey C. Hazard, Jr. was the Reporter and principal draftsman of the ABA *Model Rules of Professional Conduct* ("Kutak Code"), which was adopted by the ABA House of Delegates in 1983. He is now Director of the American Law Institute, and a Professor at Yale Law School, where he teaches Professional Responsibility.[38]

Norman Lefstein was Reporter and principal draftsman for the ABA *Standards Relating to the Prosecution Function.* He is now Vice Chairman of the ABA Criminal Justice Section, and a Professor at North Carolina Law School, where he teaches Criminal Law, Criminal Procedure, and Professional Responsibility.[39]

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[35]App. 31a-33a, *infra.*
[36]App. 35a-36a, *infra.*
[37]App. 39a-41a, *infra.*
[38]App. 44a-45a, *infra.*
[39]App. 47a-49a, *infra.*

James P. Manak was the Director of the National District Attorneys Association Project on Standards and Goals, which produced the NDAA's *National Prosecution Standards,* and was the Reporter for the *Prosecution Volume, Juvenile Justice Standards,* ABA/Institute for Judicial Administration. He also has held offices in the National District Attorneys Association, the International Association of Chiefs of Police, and Americans for Effective Law Enforcement, which files *amicus* briefs before the Supreme Court and other courts on behalf of law enforcement groups.[40]

Speaking from that broad expertise, the six authorities on prosecutors' ethics are unanimous in concluding that there is a forbidden conflict of interest on the part of the Justice Department with respect to Mario Montuoro.

Professor Hazard finds sufficient basis to establish the conflict in the prosecutors' concern that other potential informers might be discouraged from participating with the government if the Justice Department should initiate proceedings against Montuoro.[41] As Professor Babcock explains, "If a prosecutor were to charge an informant with perjury . . ., it would be more difficult in the future for the prosecutor to obtain informant testimony because his reputation for protection of informants would be undermined."[42] "And, of course," Professor Babcock adds, "such a charge would make it impossible to use the particular informant again."[43]

Professor Dash sharpens the point further. "Neither the court nor the public can have confidence in the integrity of this discretionary decision [not to prosecute Montuoro],

[40]App. 52a-54a, *infra.*
[41]App. 45a-46a, para. 18, *infra.*
[42]App. 37a-38a, para. 19, *infra.*
[43]*Ibid.*

since it appears that the controlling factor is the prosecutor's concern over the continuing availability and cooperation of informers, rather than his duty to prosecute a specific and serious violation of the law."[44]

Professor Lefstein and Mr. Manak agree,[45] and add two further concerns contributing to the prosecutors' conflict of interest. First, the decision to prosecute Montuoro would embarrass the United States Attorney's Office and cast doubt upon the judgment of prosecutors who previously relied on Montuoro's representations.[46] Second, prosecution of Montuoro for perjury could cast doubt upon the criminal conviction in *United States v. Sanzo*, in which Montuoro testified as a government witness, and conceivably could result in a collateal attack on that conviction.[47]

Professor Austern, from the perspective of a former prosecutor with supervisory responsibilities, emphasizes the "management or audit" aspect of the prosecutors' conflict of interest:

> An indictment of a prosecutor's informant is an admission by the prosecutor that valuable law enforcement resources have been wasted in the time, money and effort spent on the case which the perjurious informant presented. Inevitably, someone must ask the prosecutor why he or she did not recognize the informant's story for what it was, namely, a lie.[48]

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[44]App. 42a-43a, para. 21, *infra*.
[45]App. 49a-50a, para. 20, *infra*; App. 57a-58a, para. 22, *infra*.
[46]*Ibid.*
[47]*Ibid.*
[48]App. 34a, para. 15, *infra*.

The experts recognize that in normal situations, in which the prosecutors' office is not burdened by a conflict of interest, the prosecutor would have wide discretion regarding indictment and prosecution, and that such discretion would encompass the accused's cooperation with the government as an informer and witness. See ABA *Standards Relating to the Prosecution Function* §3.9. However, as explained by Professor Lefstein, who was the Reporter for those *Standards*, "[w]here the issue, as in Montuoro's case, is whether the witness has supplied false information and has testified untruthfully, the accused's 'cooperation' should be immaterial as a discretionary factor."[49] Otherwise, as Professor Hazard notes, unscrupulous witnesses like Montuoro would have a "license to perjure themselves."[50]

The government has not challenged those expert opinions by seeking to impeach them, by submission of contrary opinions by other experts, by other evidence, or by citation of any case or other authority. On the uncontroverted record before it, therefore, the District Court correctly accepted the postulate that the Department of Justice is disabled by a conflict of interest from exercising discretion with respect to Mario Montuoro's crimes.[51]

B. In this case, unlike *Linda R.S.* and *Leeke*, the application does not seek a coercive order or damages against any public official, and involves no intrusion whatsoever on state authority.

Linda R.S. and *Leeke* would have involved the federal courts in the most extreme interference with state criminal justice. In *Linda R.S.* a federal court was being asked to

[49]App. 50a, para. 21-22, *infra*.
[50]App. 46a, para. 18, *infra*.
[51]App. 17a, *infra;* 596 F.Supp. at 1467.

issue and to supervise coercive orders against a state prosecutor, compelling him to investigate and prosecute alleged offenses in a way that would have been contrary to the construction of a state statute by the state courts. As the Second Circuit has noted in a similar case, there would be an "inherent judicial incapacity" for a federal court to supervise state officials in their conduct of a coerced investigation and prosecution.[32] Similarly, in *Leeke v. Timmerman* the complainants sought "to prevent state officials from presenting information . . . that will assist the [state] magistrate in determining whether to issue the arrest warrant."[33]

The present Application, by contrast, rests exclusively within the federal sphere and does not seek coercive orders or damages against any public official. Rather, it requests the District Court to exercise discretion (1) pursuant to its supervisory authority over the administration of justice in federal proceedings; (2) pursuant to its ancillary power over criminal contempt of its orders, as codified in Fed.R.Cr.P. 42(b); and (3) pursuant to its inherent power to fill a vacancy created by the prosecutors' disqualification.

The expert witnesses were therefore unanimous in concluding that the appropriate remedy for the Justice Department's conflict of interest regarding Montuoro is the appointment of independent counsel by the District Court.[34] Professor Austern expressed the consensus:

> As Watergate and a host of other Special Prosecutor . . . investigations have taught—including

[32] *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 382 (2d Cir. 1973).

[33] *Leeke v. Timmerman*, 454 U.S. at 87.

[34] App. 34a, 38a, 43a, 46a, 51a, 58a, *infra*.

> the [Meese matter] on which I am now working—*a prosecutor truly independent of the Department of Justice is the proper person to resolve the ethical conflict in the case at hand.*[55]

The *National Prosecution Standards,* promulgated by the prosecutors themselves, expressly recognizes "the need for special prosecutors in instances of potential conflict of interest."[56] Appointment of independent counsel is "mandated," the prosecutors assert, by "the careful scrutiny imposed by modern society and the responsibility to uphold justice without bias . . ."[57]

The *Standards* therefore provide for court appointment of independent counsel in cases of "recognizable or potential conflicts of interest."[58] The comment to the *Standards* notes that appointment of independent counsel where the regular prosecutor "may be compromised" is "an established practice" deriving from the "inherent power" of the courts.[59] A petition for such appointment may be made either by the prosecutor or by a private citizen.[60]

As testified by James P. Manak, who drafted the *Standards* on behalf of the prosecutors, "the appointment of a special prosecutor in this case to consider prosecution of Montuoro . . . is recommended by the National Prosecution Standards . . . as the recognized and acceptable manner of balancing the interests of all concerned."[61] Specifically, Mr. Manak notes, the appointment requested by Petitioners "will aid the present prosecutor in carrying

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[55] App. 34a, para. 16 *infra* (emphasis added).
[56] NDAA, *National Prosecution Standards,* ch. 3, p. 38.
[57] *Ibid.*
[58] *Id.*, Standard 3.2(A) and (D).
[59] *Id.*, p. 45.
[60] *Id.*, p. 46.
[61] App. 42a-43a, paras. 20, 22, 23, *infra.*

out his responsibilities" because it "will relieve his office of the reality and appearance of a conflict of interest."[62]

The supervisory authority of the federal courts over the administration of criminal justice in federal courts extends to out-of-court conduct by members of the executive branch. See *McNabb v. United States,* 318 U.S. 332 (1943). The exercise of such authority does not depend upon statutory authorization, rules of evidence, or upon violation of the constitution by an executive officer.[63]

Lower federal courts have expressly followed *McNabb* in asserting supervisor authority over the administration of justice.[64] Although the sanction in *McNabb* was the exclusion of evidence, the supervisory power of federal courts may be exercised "in any manner necessary to remedy abuses of a district court's process."[65] Accordingly, the supervisory authority of federal district courts embraces even the power to suspend a prosecutor from practice.[66]

Prosecutors are, of course, subject to the legal profession's standards of professional ethics.[67] Moreover, despite the status of prosecutors as members of the Department of Justice and within the executive branch, federal district courts have the duty to enforce ethical

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[62] *Id.*, paras. 22, 23.

[63] *McNabb v. United States,* 318 U.S. 332 (1943); *United States v. Jacobs,* 547 F.2d 772, 778 (2d Cir. 1976), *cert. dismissed as improv. granted,* 436 U.S. 31 (1978).

[64] See, *e.g., United States v. Jacobs,* 547 F.2d at 776; *United States v. Toscanino,* 500 F.2d 267, 276, *reh. denied,* 504 F.2d 1380 (2d Cir. 1974).

[65] *United States v. Toscanino,* 500 F.2d at 276.

[66] *United States v. Modica,* 663 F.2d 1173, 485 (2d Cir. 1981), *cert. denied,* 456 U.S. 989 (1982).

[67] *United States v. Hogan,* 712 F.2d 757, 758 (2d Cir. 1983); *United States v. Jamil,* 707 F.2d 638, 645 (2d Cir. 1983).

standards against them.[68] It is the judicial branch, not the prosecutors, that ultimately defines "the bounds of permissible prosecutorial conduct."[69]

This Court has already exercised its supervisory jurisdiction in a case involving the possibility of perjury by a government witness.[70] In doing so, the Court expressly recognized a judicial "duty . . . to see that the waters of justice are not polluted" by false testimony.[71]

The waters of justice have been polluted in just that way in the present case. As a government witness, Mario Montuoro gave perjured testimony before a grand jury, falsely implicating Petitioners and others in felonious conduct. Because of the close relationship the prosecutors' office has had with Montuoro over a period of years, it is burdened by a conflict of interest, and cannot ethically exercise discretion with respect to the prosecution of Montuoro.[72] Surely a court that has the power to suspend a prosecutor from practice on ethical grounds,[73] has the power to disqualify a prosecutor from a single case on ehtical grounds. The District Court therefore has the power to disqualify the prosecutor from exercising discretion with respect to Montuoro.

Moreover, as we have seen, the federal courts' supervisory authority "may be exercised in any manner necessary to remedy abuses of a district court's process."[74] In the present case, simply disqualifying the prosecutor would not cleanse the waters of justice, but would leave

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[68] *United States v. Modica*, 663 F.2d at 1185, n. 9.

[69] *United States v. Tantalo*, 680 F.2d 903, 909 (2d Cir. 1982); *United States v. Hinton*, 543 F.2d at 1010.

[70] *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1 (1956).

[71] *Ibid.*, 352 U.S. at 14.

[72] See pp. 9-14, *supra*.

[73] *United States v. Modica*, 663 F.2d at 1185.

[74] *United States v. Toscanino*, 500 E.2d at 276.

uncorrected a situation in which "[n]either the court nor the public can have confidence in the integrity of [the result]."[75] Accordingly, as all six expert witnesses have agreed, the appropriate remedy in this case is appointment by the District Court of independent counsel.

In addition to their supervisory powers, federal courts have inherent power to appoint independent counsel to prosecute criminal contempts of court. That inherent power has been codified in Rule 42(b) of the Federal Rules of Criminal Procedure.[76] In the present case, Montuoro's contempt consisted in his violation of an order of the District Court directing him to testify truthfully before the grand jury investigating his allegations.

As Judge Learned Hand wrote in *McCann*, a district court judge may appoint independent counsel to investigate and prosecute a criminal contempt. "There is no reason why he should not do so." Judge Hand wrote, "and every reason why he should." 80 F.2d at 214.[77]

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[75]Affidavit of Professor Samuel Dash, App. 42a-43a, para. 21, *infra*.

[76]See *Musidor B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982); *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), *cert. denied sub nom. McCann v. Leibell*, 299 U.S. 603 (1936). *United States ex rel. Vuitton et Fils S. A. v. Karen Bags, Inc.*, U.S.D.C., S.D.N.Y., 83 Cr. Misc. 1.

[77]In view of the courts' criminal contempt powers, which have included appointment of prosecuting counsel, the treatment of that issue by the District Court below was clearly wrong. Relying on dictum, the District Court found a "gloss" on Rule 42(b) that limits the judicial appointment power to cases in which the criminal contempt arises "in civil litigation." App. 21a, *infra;* 596 F.Supp. at 1469. The language of Rule 42(b), however, is clearly contrary. Neither in the rule itself, nor in the Notes of the Advisory Committee on Rules, is there even a hint of such a limitation on the power of federal courts to appoint a member of the bar to prosecute a criminal contempt before a grand jury.

In addition to their supervisory authority and ancillary power, the courts' inherent power to replace a prosecutor who is temporarily absent or disqualified has a long common law history. The power has been recognized in most states, and has even been characterized as a judicial duty rather than a discretionary power.[78] Moreover, the judicial power to appoint independent counsel is strongest and clearest when, as in the present case, the regular prosecutor is disqualified by a conflict of interest.[79]

C. In this case, unlike *Linda R. S.* and *Leeke*, there is a clear nexus between the injury suffered by Petitioners and the remedy they seek.

In *Linda R. S.* the plaintiff sought to compel the prosecutor to adopt a policy of prosecuting fathers of illegitimate children for nonsupport. A five-member majority of this Court held that the plaintiff there lacked a sufficient nexus to establish standing, because "if [plaintiff] were granted the requested relief, it would result only in the jailing of the child's father." Whether that, in turn, would result in payment of support, the majority said, "can, at best, be termed only speculative."[80] Similarly, this Court held in *Leeke*:[81]

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[78]27 C.J.S., District and Prosecuting Attorneys §28(3). For state authorities, see, e.g., *State ex rel. Meyers v. Tippecanoe Country Court*, 432 N.E.2d 1377 (Ind., 1982); *Kirk v. Baker*, 224 So.2d 311, 317-318 (Fla., 1969); *Webster County Board of Supervisors v. Flattery*, 268 N.W. 2d 869, 874-875 (Iowa, 1978); *State v. Bobbitt*, 270 S.W. 378 (Mo., 1925); *State ex rel. Thomas v. Henderson*, 175 N.E. 865, 866 (Ohio, 1931); *Baggett v. State*, 248 P. 875, 876 (Okla., 1926). See also cases cited in next footnote.

[79]See, e.g., *State v. Brandt*, 253 N.W.2d 253, 262 (Iowa, 1977); *State v. Jones*, 268 S.W. 83, 85 (Mo., 1924); *Spaulding v. State*, 85 N.W. 80, 82 (Neb., 1901); *Lizar v. State*, 166 P.2d 119, 123 (Okla., 1946); *Hisaw v. State*, 165 P. 636, 639, 640 (Okla., 1917); *State v. Gauthier*, 231 P. 141, 143 (Ore., 1924).

[80]410 U.S. at 618.

[81]454 U.S. at 86.

> As in *Linda R. S.*, there is a questionable nexus between respondents' injury—the alleged beatings—and the actions of the state officials in which they gave information to a Magistrate prior to issuance of an arrest warrant. Even without the prosecutor's acts, there is no guarantee that issuance of the arrest warrant would remedy the past misconduct of guards or prevent future misconduct.

In the present case, by contrast, there is a clear nexus between the injury suffered by Petitioners and the remedy they seek.

The injury was caused to Petitioners by a government informer and witness, Mario Montuoro. In transmitting to Washington the perjurious accusations made by Montuoro that are here at issue, federal prosecutors vouched for Montuoro's credibility and reliability:[82]

> . . . *Montuoro has always proven reliable in information which he has provided to the government.* On June 23, 1981, Sanzo was convicted of two counts of tax evasion . . . and one count of conspiracy . . . . Montuoro was a government witness in that case.

Indeed, it is the nexus between the prosecutors' office and Montuoro that has caused the six experts on lawyers' ethics to conclude that the prosecutors' office is disabled by a conflict of interest, requiring appointment of special counsel.[83]

Thus, the government is linked to Petitioners' injury in two respects that were absent in *Linda R. S.* and in *Leeke*.

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[82]Memorandum from Thomas P. Puccio, Attorney-in Charge, Brooklyn Strike Force, Court of Appeals App. 62 (emphasis added).

[83]See pp. 31a-58a, *supra*.

First, there is a nexus between the government and Petitioners' injury because of the federal prosecutors' vouching for Montuoro regarding his false allegations against Petitioners. Second, there is a nexus between "[Petitioners'] injury and the government's failure to prosecute"[84] because the government has failed to prosecute as a result of the conflict of interest caused by its association with Montuoro.

The other requisite nexus relates to whether Petitioners' injury is "likely to be redressed" by a favorable outcome.[85] In *Leeke* the Court noted that it was speculative whether issuance of an arrest warrant against the jail guards would remedy their claimed past misconduct or prevent future misconduct.[86] And in *Linda R. S.* the Court also noted that there was only a speculative nexus between "the jailing of the [illegitimate] child's father" and payment of its support.[87]

In the present case, by contrast, the jailing of Montuoro for perjury against Petitioners would manifest to the world that the man who accused Petitioners of felonious conduct did so perjuriously. That, in itself, is the vindication and the ultimate remedy that Petitioners seek.

Finally, in view of the prosecutors' conflict of interest, if the victims of Montuoro's perjury and contempt of court do not have standing to bring those crimes to the attention of the District Court, who else will have the knowledge and the incentive to do so?

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[84]See *Leeke v. Timmerman*, 454 U.S. at 86, discussing *Linda R. S.*

[85]*Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

[86]*Leek v. Timmerman*, 454 U.S. at 86.

[87]*Linda R. S. v. Richard D.*, 410 U.S. at 618.

Conclusion.

This case presents the Court with the opportunity to clarify an important aspect of the fundamental issue of standing, particularly with respect to the closely divided decision in *Linda R. S. v. Richard D.* Petitioners therefore request that the writ of certiorari be allowed.

Respectfully submitted,

MONROE H. FREEDMAN
Law Building
1000 Fulton Avenue
Hempstead, NY 11550
(516) 560-5882

Opinion and Order of The United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1066 — August Term, 1984

(Argued: April 11, 1985 Decided: June 24, 1985)

Docket No. 84-6362

IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF INDEPENDENT COUNSEL

RONALD A. SCHIAVONE and the SCHIAVONE CONSTRUCTION COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE, *Circuit Judges*.

Appeal by applicants, Ronald A. Schiavone and the Schiavone Construction Company, from an order by the United States District Court for the Eastern District of New York (Glasser, *J.*) that denied a request made by applicants for the appointment of independent counsel to investigate whether a government informer had falsely testified before a grand jury and, if so, to prosecute the

informer for any violation of federal law warranted by the investigation. Because the applicants lack standing under Article III of the United States Constitution to institute this action, the order of the district court is vacated and the proceeding dismissed.

MONROE H. FREEDMAN, Hempstead, New York (Orenstein & Orenstein, P.C., New York, New York, of counsel), *for Appellants.*

PATTY MERKAMP STEMLER, Department of Justice, Washington, D.C. (Raymond J. Dearie, United States Attorney, Eastern District of New York, Stephen S. Trott, Assistant Attorney General, New York, New York, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge:*

The issue we address in this case is whether appellants have standing under Article III of the Constitution to invoke the power of the federal courts. If they do not, we need go no further. Analyzing Article III standing in a given case is not always easy. The Supreme Court decisions in this area do not mesh with nice consistency, and the concept cannot be stated in a neat epigram. *See Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 475 (1982). Yet, standing is far from being like Milton's Serbonian bog "[w]here armies whole have sunk;" [1] nor is it even so inordinately complex as some commentators view it. *See, e.g.*, 4 K. Davis, *Administra-*

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[1] J. Milton, *Paradise Lost*, in 4 Harvard Classics, *The Complete Poems of John Milton* 125 (Eliot ed. 1909).

tive Law Treatise § 24:1 (2d ed. 1983). Hence, a court confronted with a standing issue should decide it.

Ronald A. Schiavone and the Schiavone Construction Company applied to the United States District Court for the Eastern District of New York (Glasser, *J.*) for appointment of independent counsel to investigate whether one Mario Montuoro had given false evidence before a grand jury and, if so, to prosecute for any violation of federal criminal law warranted by that finding. The district court denied the application holding that the court has no constitutional or statutory authority to make an appointment of counsel. 596 F. Supp. 1465 (E.D.N.Y. 1984). On appeal, the government, which has opposed the application throughout the proceeding, urges affirmance of the district court decision or, in the alternative, dismissal of the application because appellants lack standing to seek such appointment. For the reasons stated below, we vacate the district court's order and dismiss the proceeding.

I BACKGROUND

On September 20, 1984 an application for appointment of independent counsel was filed on behalf of appellants Ronald A. Schiavone and the Schiavone Construction Company. The allegations contained in the application, reproduced in 596 F. Supp. at 1466, may be summarized briefly. The applicants alleged that Mario Montuoro has a criminal record and has acted as an informer for the United States Department of Justice. Montuoro told federal agents that Ronald A. Schiavone and Raymond J. Donovan, as officers of Schiavone Construction Company, had made an illegal payment to a union officer at a luncheon in 1979. In 1981 Donovan was appointed as United States Secretary of Labor. Shortly afterwards

the United States Court of Appeals for the District of Columbia appointed a Special Prosecutor to investigate Montuoro's allegations. Pursuant to an order of the Eastern District Court, issued at the behest of the Special Prosecutor, Montuoro testified before a grand jury and repeated the allegations regarding the luncheon. The grand jury unanimously refused to indict either Schiavone or Donovan on Montuoro's allegations. The Special Prosecutor concluded that "no credible evidence exist[ed] that a luncheon as alleged by Montuoro ever occurred."

Schiavone claimed that Montuoro's conduct warranted criminal prosecution for perjury, 18 U.S.C. § 1621, false declaration before a grand jury, 18 U.S.C. § 1623, false statements, 18 U.S.C. § 1001, obstruction of justice, 18 U.S.C. § 1505, and contempt, 18 U.S.C. § 401. Schiavone further stated that the government has not sought to indict Montuoro on any of these charges. With his application to the district court, he submitted affidavits by six experts in the field of professional responsibility, all of whom were of the opinion that the Department of Justice violated applicable standards of professional conduct by failing to prosecute Montuoro for his false testimony because of a conflict of interest. *See* 596 F. Supp. at 1466-67 & n.1. Schiavone asked the district court to appoint independent counsel to investigate and, if warranted, prosecute Montuoro.

The district court denied the application on its merits. The court held that it had no inherent or statutory authority to appoint an independent prosecutor, and that there was no precedent in the history of the common law for such an appointment. It concluded that the constitutional principle of separation of powers between the executive and the judicial branches, together with the broad

discretion vested in the prosecutor, precluded the court from interfering with the prosecutorial function. At the end of its opinion the district court noted the government's assertion that Schiavone lacked standing to submit his application, but declined to rule on that issue. 596 F. Supp. at 1472. Without reaching or considering the correctness of the district court's substantive conclusions, we hold that the applicants do not meet the threshold requirements of standing.

II Discussion

A. *General Rules Governing Standing*

The framers of the Constitution drawing on history's examples urged that the preservation of liberty depended on keeping the "three great departments of power . . . separate and distinct." *The Federalist* No. 47, at 313 (J. Madison) (Sesquicentennial ed. 1937). The separation of powers is the bedrock theory upon which our federal government rests. With respect to the federal judiciary, this concept is embodied in section 2 of Article III of the Constitution, which states that the "judicial Power" of the federal courts "shall extend to" certain described "Cases" and "Controversies."

A legal device crafted in decisional law to implement the case-or-controversy requirement is the doctrine of standing, which places limits on a plaintiff's ability to invoke the power of the federal courts. *See, e.g., Allen* v. *Wright*, 104 S. Ct. 3315, 3324 (1984). Standing asks whether a particular litigant is entitled to invoke the power of the federal court. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Since the standing

requirement is derived from Article III limitations on the federal courts' powers, it is the threshold issue in every case. To demonstrate standing a plaintiff must establish first that he has suffered some "distinct and palpable injury," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501), which may be actual or threatened, economic or noneconomic. *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 152 (1970). Second, the injury must be the result of the "putatively illegal conduct of the defendant." *Gladstone*, 441 U.S. at 99. In other words, plaintiff must show that the injury "fairly can be traced to the challenged action." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976). Nor may the causation between the illegal conduct and the injury be too attenuated. *Wright*, 104 S. Ct. at 3325. Finally, it must be likely that plaintiff's injury will be redressed by a favorable court decision. *Valley Forge*, 454 U.S. at 472; *Simon*, 426 U.S. at 38.

The Supreme Court consistently has stated that the essence of the question of standing is whether plaintiff has "demonstrate[d] a 'personal stake in the outcome' [of the controversy] in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). But standing "is not measured by the intensity of the litigant's interest," *see Valley Forge*, 454 U.S. at 486, and "concrete adverseness" is not intended to substitute for the requirement that a plaintiff show that he personally suffered actual or threatened injury as a result of defendant's conduct. *Id.* Instead, that phrase simply reflects the helpful consequences that follow after a plaintiff has met

Article III's rigorous actual case-or-controversy requirements. C. Wright, *Law of Federal Courts* § 13, at 70 (4th ed. 1983).

In addition to the Article III standing requirements, there are judge-made, prudential limitations on the exercise by a federal court of judicial power. *See, e.g., Wright*, 104 S. Ct. at 3324-25; *Valley Forge*, 454 U.S. at 474-75. These judicially self-imposed limits prevent a litigant from resting his claim to relief on the legal rights of some third party, and bar adjudication of abstract questions that, although perhaps of wide public significance, really amount to no more than generalized grievances. *Id.* They also require plaintiff's complaint to fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations*, 397 U.S. at 153.

B. *Supreme Court Precedents*

With the Article III requirements and prudential limitations in mind, we consider several Supreme Court cases that have applied these factors in the same area of the law as that now under consideration. The appellant in *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), was the mother of an illegitimate child who brought an action on behalf of herself, her child, and others similarly situated to enjoin the "discriminatory application" of Art. 602 of the Texas Penal Code. Article 602 made it a misdemeanor for a parent to "wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age." *Id.* at 615. Appellant alleged that the father of her illegitimate child had refused to provide support for the child and that the local district attorney would not prosecute because, in his view, the fathers of illegitimate children were not within Art.

602's scope. Appellant sought both a declaratory judgment that this provision of the Texas Penal Code was unconstitutional and an injunction to prohibit the district attorney from declining to prosecute the father on the ground that the unsupported child is illegitimate. *Id.* at 616.

The district court dismissed the mother's case for lack of standing and the Supreme Court affirmed. The Court held that appellant "failed to allege a sufficient nexus between her injury and the government action which she attack[ed] to justify judicial intervention." *Id.* at 617-18. Acknowledging that the mother of the child had in fact suffered injury as a result of the father's neglect, it found that the mother had not shown a connection between her failure to obtain support for the child and the nonenforcement of Art. 602. The Court concluded: "Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.* at 618. The Supreme Court further observed: "prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619.

In *Leeke* v. *Timmerman*, 454 U.S. 83 (1981), the Court held that prison inmates who claimed that they had been beaten by guards had no standing to prevent state officials from submitting information to the magistrate to assist him in deciding whether to issue warrants for the guards' arrest. *Id.* at 87. The Court ruled that there

was a "questionable nexus" between the inmates' injuries and the actions of the state officials. *Id.* at 86. First, there was no assurance that the issuance of warrants would have led to the prosecution of the guards and, even if it had, there was no guarantee that prosecution would have remedied the plaintiffs' injuries. Thus, such issuance would not necessarily have provided plaintiffs any relief. *Id.* at 86-87. *Cf. Heckler* v. *Chaney*, 105 S. Ct. 1649, 1656 (1985) (agency decision not to take enforcement actions requested by individuals not subject to review under the Administrative Procedure Act, analogizing an agency's decision to enforce with the prosecutor's decision to indict).

C. *Standing Requirements Applied to This Case*

We note that on appeal the government properly raised the standing issue, even though the district court declined to rule on the issue and the government did not cross-appeal. First, as standing derives from Article III's limitation on federal judicial power, it is a threshold issue in every case. *Warth*, 422 U.S. at 498. Before a trial or appellate court rules on any claim, it must have power to adjudicate that claim. Only if a proper party invokes the court's power will it be entitled to relief. *See Village of Arlington Heights* v. *Metropolitan Development Housing Corp.*, 429 U.S. 252, 260 (1977). Second, the district court did not decide adversely to the government on the standing issue; it simply left the question open. Inasmuch as the government's position on appeal supports the district court judgment, it may urge the standing argument without taking a cross-appeal. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970); *United States* v. *American Railway Express*, 265 U.S. 425, 435-36 (1924). Thus, the question of Schiavone's standing to invoke the power of the federal court is properly before us.

We turn to analyze the circumstances of this case. In so doing we recognize that when ruling on a motion to dismiss for want of standing, we must accept all material allegations of the application as true. *Warth*, 422 U.S. at 501. We also recognize that, when ruling on standing, a court must examine the substantive issues to discover whether there is a nexus between the alleged injury and the claim sought to be adjudicated in a federal court. *See Flast* v. *Cohen*, 392 U.S. 83 (1968). But when a plaintiff lacks standing the court must dismiss the case on that ground, and it is unnecessary to intimate a view as to the merits of the claim. *Linda R.S.*, 410 U.S. at 619 n.6.

Applying the standing tests and the Supreme Court's ruling in *Linda R. S.* it is evident that applicants lack standing. Concededly, applicants have suffered an injury stemming from Montuoro's statements to federal officers and the grand jury. Public allegations that construction company officers made an improper payment to a union officer are damaging to the reputation of the company and the individuals involved, both within the industry and the community. Yet, even granting counsel's argument that the individual applicant and the company suffered serious reputational and economic injury, applicants have failed to demonstrate that their injuries are traceable to the government's failure to prosecute. Any injury they suffered was a result of Montuoro's actions and the perception of the public; none was caused by the government's inaction.

Further, were the court to grant the relief requested, such relief would not redress the applicants' injuries. Even *if* independent counsel were to investigate Montuoro, and *if* prosecution were warranted, and *if* Montuoro were convicted, to say that the prospect of applicants obtaining

relief from such prosecution is speculative is surely an understatement. Successful prosecution would only result in the jailing of Montuoro, not in financial recompense for Schiavone. *See Linda R. S.*, 410 U.S. at 618. What applicants actually seek is public vindication for a private wrong. And, as mentioned earlier, the Supreme Court has clearly stated: "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* at 619. Thus, although applicants have satisfied the first standing requirement by demonstrating an injury, that injury is not traceable to the government's failure to prosecute Montuoro, and a favorable decision on the application will not redress the injury.

D. *Prudential Limitations Applied to This Case*

Appellants further contend that they satisfy the "zone of interests" test enunciated by the Supreme Court in *Association of Data Processing Service Organizations*, 397 U.S. at 158 (data processing organizations permitted to challenge Comptroller of the Currency's ruling that allowed national banks to provide data processing services). A plaintiff derives "zone of interests" standing from a statute. Hence, the applicants claim that they have suffered some "injury in fact" and that they are "arguably within the zone of interests" protected by the statutes that forbid perjury and related conduct. Although this argument has a plausible ring, it need not detain us long.

Appellants failed to prove the most critical aspect of the standing requirement: that there is some reasonable nexus between their injury and the challenged action, or in this case, the challenged inaction. It is well-settled

that the bare existence of an abstract injury is not enough to confer standing. *See Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). The zone of interests test is a judicially created prudential limitation on federal court power. The test is another hurdle for plaintiffs *after* they have satisfied the case-or-controversy requirements; it is not a substitute for the standing requirements of Article III. As noted, appellants have failed to satisfy the constitutional standing requirements. Thus, they are not entitled to invoke the power of the federal court, regardless of whether they satisfy the zone of interests test.

Finally, applicants claim that they are permitted to submit an application for independent counsel in order to vindicate the public interest in the fair administration of justice. But they have not alleged any particularized injury with respect to this goal. Rather, whatever injury they suffered in this context is one shared by society at large. The doctrine of separation of powers precludes an individual from invoking the power of a court to compel the government to act on behalf of all members of society to vindicate the administration of justice. *See Wright*, 104 S. Ct. at 3228, and cases cited.

III CONCLUSION

We therefore conclude that applicants lack standing to submit their application for the appointment of independent counsel. The district court's order is vacated and the application dismissed.

Memorandum and Order of the United States District Court for the Eastern District of New York.

In the Matter of an Application for Appointment of Independent Counsel.

No. 84 Civ. 3886.

United States District Court,
E.D. New York.

Nov. 6, 1984

Monroe H. Freedman, Hempstead, N.Y., Orenstein, Snitow & Pauley, P.C., New York City, for applicants.

Asst. Atty. Gen. Stephen A. Trott, Dept. of Justice, Washington, D.C., William C. Bryson, Dept. of Justice, Washington, D.C., Paul J. Larkin, Jr., Dept. of Justice, Washington, D.C., for the government.

Memorandum and Order

GLASSER, District Judge:

An application was submitted to this Court on behalf of Ronald A. Schiavone and the Schiavone Construction Company (the "Applicants"), requesting the Court to appoint one or more members of the Bar of the Court to serve as independent counsel, to investigate whether Mario Montuoro gave false evidence and made false statements in violation of Federal law and to prosecute for any violation of Federal criminal law warranted by that investigation. During the course of oral argument, the Government moved for leave to intervene, which was granted.

The application is based upon the following allegations:

Mario Montuoro has a criminal record that includes four arrests, one in 1969 for possession of heroin, and one in 1974 for possession of a gun;

Montuoro has an established relationship with the United States Department of Justice as an informer. For example, in an organized crime case in 1981, Montuoro was a witness on behalf of the prosecution, and the defendant was convicted;

Montuoro's cooperation with the Justice Department might have stemmed from motives of revenge against people about whom he has given information, and, in view of his criminal record, from a desire to ingratiate himself with the prosecutor's office;

In 1979 and thereafter, Montuoro told Federal agents, including members of the Federal Organized Crime Strike Force in Brooklyn, that Raymond J. Donovan and Ronald A. Schiavone, as officers of Schiavone Constuction Company, were guilty of participating in an illegal cash payment to a union officer. The payment was said to have been made at a luncheon at Prudenti's Restaurant in May or June of 1977;

In 1981, Raymond J. Donovan became Secretary of Labor of the United States. Later the same year, a division of the United States Court of Appeals for the District of Columbia Circuit appointed Leon Silverman Special Prosecutor, expressly to investigate Montuoro's allegation about the luncheon at Prudenti's;

Under an order of the United States District Court for the Eastern District of New York, issued at the request of the Special Prosecutor, Montuoro testified before a grand jury, and repeated the allegation regarding the luncheon at Prudenti's. The grand jury unanimously returned a no true bill on the allegation;

After an exhaustive investigion of Montuoro's allegation, the Special Prosecutor found that Montuoro's

specifications of dates were "inconsistent," that his attempts to relate the luncheon to other events "proved to be illusory," and that there is "no evidence corroborating Montuoro's assertion that any Prudenti's lunch attended by Messrs. Donovan, DiCarlis, Schiavone, Lugori, Sanzo, and Montuoro himself occurred at or near the time he alleged or, for that matter, at any other time examined in the course of this investigation." In short, the Special Prosecutor concluded that "no credible evidence exists that a luncheon as alleged by Montuoro ever occurred;"

Montuoro's conduct, as described in the preceding paragraphs, would justify indictments against him for several federal crimes, including Perjury (18 U.S.C. § 1621), False Declaration Before a Grand Jury (18 U.S.C. § 1623), False Statements (18 U.S.C. § 1001), Obstruction of Justice (18 U.S.C. § 1505), and/or Contempt (18 U.S.C. § 401);

Although formal requests have been made of the Justice Department by Ronald Schiavone that Montuoro be prosecuted, the Department has not sought any indictment of Montuoro. The statute of limitations has now run on Criminal Contempt, but has not yet run on the other crimes.

Affidavits by six persons characterized as highly qualified experts on the professional responsibilities of prosecutors[1] are submitted in support of the application. Those persons are unanimous in their conclusion that members of the Department of Justice have a conflict of interest in violation of applicable standards of professional conduct with regard to investigating and prosecuting Mario Montuoro and that this Court should resolve the conflict of interest by appointing independent counsel to investigate and, if warranted, prosecute Montuoro. Federal authority for such an appointment in a case such as this is not furnished in any of those affidavits.

[1]David T. Austern was as Federal prosecutor (Chief of Grand Jury/Intake Unit and Chief of Felony Trials), a New York County Prosecutor (Rackets Bureau), and the Bar Counsel for the District of Columbia Board on Professional Responsibility. He was himself a court-appointed Special Prosecutor (with Jacob Stein) in the Investigation of the Appointment of Edwin Meese to be Attorney General.

Barbara Allen Babcock was an Assistant Attorney General of the United States, the Director of the Public Defender Service of the District of Columbia, and a member of the ABA's Criminal Justice Council. She is now a Professor at Stanford Law School, where she teaches Criminal Procedure and Professional Responsibility.

Samuel Dash was the Chief Counsel for the Senate Watergate Committee, the District Attorney for Philadelphia, a Special Consultant to the Advisory Committee on the ABA Standards Relating to the Defense and Prosecution Functions, and the Chairman of the ABA Section on Criminal Law. He is now a Professor at Georgetown Law School, where he teaches Criminal Law, Criminal Procedure, and Professional Responsibility.

Geoffrey C. Hazard, Jr. was the Reporter and principal draftsman of the ABA Model Rules of Professional Conduct ("Kutak Code"), which was adopted the ABA house of Delegates in 1983. He is now the Director of the American Law Institute, and a Professor at Yale Law School, where he teaches Professional Responsibility.

Norman Lefstein was the reporter and principal draftsman for the ABA Standards Relating to the Prosecution Function. He is now the Vice Chairman of the ABA Criminal Justice Section, and a Professor at North Carolina Law School, where he teaches Criminal Law, Criminal Procedure, and Professional Responsibility.

James P. Manak was the Director of the National District Attorneys Association Project on Standards and Goals, which produced the NDAA's National Prosecution Standards, and was the Reporter for the Prosecution Volume, Juvenile Justice Standards, ABA/Institute for Judicial Administration. He has also held offices in the National District Attorneys Association, the International Association of Chiefs of Police, and Americans for Effective Law Enforcement, which files amicus briefs before the Supreme Court and other courts on behalf of law enforcement groups.

I.

A variety of arguments are urged upon the Court to move it to grant the requested relief. Only those deemed relevant to the crucial question of the jurisdiction and authority of the Court to grant the application will be considered.

A. *Inherent Power of the Court*

The Applicants leap from the conflict of interest postulate to the inherent power of the Court to appoint a special prosecutor to resolve the conflict. That inherent power, it is argued, has a long common law tradition, antedating the Constitution. The authority advanced are state cases in many of which the courts are authorized by statute to appoint special prosecutors and others where the state courts have, indeed, asserted power to appoint special prosecutors where the official prosecutor was sick or otherwise disqualified.[2] The concept of "inherent power" is like a ghost that is seen in the law but is elusive to the grasp. In *Smith v. Gallagher,* 408 Pa. 551, 574, 185 A.2d 135, 146 (1962), Justice Musmanno, in responding to the argument that a court had inherent power to convene a special grand jury in a "highly specialized situation," characterized it as follows: "This is an argument which sails a sea glittering with generalities, from which there emerges not a solid rock of jurisprudence on which one can stand and assert a tangible rule, or palpable principle, recognizable in law." Notwithstanding such state authority as there may be for the Application, there is no federal authority, either statutory or judicial, that would support it in a case such as this.

[2]*See,* The Special Prosecutor in the Federal System: A Proposal, 11 American Criminal Law Review 577, 579-581 (1973).

In addition, the Applicants assert that from the earliest days of the common law "an aggrieved party has had the right in England to prosecute criminally, for the vindication of private as well as public wrongs." It should be noted in this regard that in England the prosecution of offenses was left entirely to private persons or to public officers who acted in their capacity of private persons and who had hardly any legal powers beyond those which belonged to private persons. 1 F. Stephen, A History of the Criminal Law of England, 490-96 (1883). The power to institute prosecutions did not carry with it unlimited control over them when they were instituted. When a charge was made, the maker of it was usually bound over to prosecute and when the bill was sent before the Grand Jury the matter was entirely out of the original prosecutor's hands and must run its course unless the Attorney General, as the representative of the Crown, enters a *nolle prosequi* which operates as a stay of the proceedings. 1 F. Stephen, *supra*, 496. The Attorney General's discretion to enter a *nolle prosequi* was unfettered and never interfered with by the English courts even if in doing so, he abused his power. *Regina v. Allen,* 121 Eng. Rep. 929, 931 (K.B. 1862).[3]

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[3]In *Regina v. Allen,* the question before the court was whether the Attorney General has power to enter a *nolle prosequi* on an indictment without calling upon the prosecutor to show cause why that should not be done, and, where he has done so, should the Court interfere. Also before the court was the question of whether the *nolle prosequi* would put an end to the prosecution altogether. The court decided that the Attorney General had the power with which the Court would not interfere and having exercised that power the prosecution was terminated. Chief Judge Cockburn expressed the rule thus:

> It is an undoubted power of the Attorney General, as representative of the Crown in matters of criminal judicature, to enter a *nolle prosequi,* and thereby to stay proceedings in

(Footnote continued on following page.)

> any indictment or criminal proceeding. No instance has been cited, and therefore it may be presumed that none can be found, in which after a *nolle prosequi* has been entered by the fiat of the the Attorney General, this Court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment. . . . Suppose it possible that there could be an abuse of power by the Attorney General, or injustice in the exercise of it, the remedy is by holding him responsible for his acts before the great tribunal of this country, the High Court of Parliament. I have no doubt that the Attorney General has this power; and this Court has never interfered with it.

Regina v. Allen, supra, at 931.

Judge Crompton stated the principle as follows:

> It would be very mischievous, by granting a rule nisi, to raise any doubt in so clear a matter. In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether it is proper to proceed further in a prosecution. That power is vested by the constitution in the Attorney General and not in this Court.

Regina v. Allen, supra, at 931.

Judge Blackburn wrote:

> But the power of determining whether the prosecution of an indictment shall go on or not, is entrusted to the Attorney General, who is the great law officer of the Crown; and whether he is right or wrong this Court cannot interfere.

Regina v. Allen, supra, at 932.

Finally, Judge Mellor observed:

> If we were to interfere in the manner suggested, a serious conflict might arise between the jurisdiction of this Court and the functions of the Attorney General.

Regina v. Allen, supra, at 932.

The judges of the Court of Kings Bench might have been writing for American courts more than a century later in cases such as *United States v. Cox, Newman v. United States,* and *Inmates of Attica Correctional Facility v. Rockefeller, infra.*

The English practice of private prosecution never took root in American soil. The public prosecution of crime in the United States antedated the independence of the Colonies. The early settlers, dissatisfied with the shortcomings of a system of private prosecution, recognized the necessity of having criminal prosecutions conducted by impartial government officials rather than by interested private parties. See, The Outmoded Concept of Private Prosecution, 25 American University Law Rev. 754, 756-65 (1976); *see also* The Special Prosecutor in the Federal System: A Proposal, 11 American Cr.L.Rev. 577, 604 (1973); Private Prosecution: A Remedy for District Attoneys' Unwarranted Inaction, 65 Yale L.J. 209, 223 (1955); *Linda R.S. v. Richard,* 410 U.S. 614, 619, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1972) ("[I]n American jurisprudence at least a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another").

B. *Appointment of Prosecuting Attorneys in Civil Cases*

The Applicants find succor in the civil cases of which *Musidor B.V. v. Great American Screen,* 658 F.2d 60 (2d Cir. 1981) is a paradigm, in which courts have appointed the attorney for one party to prosecute criminal charges (contempt) against the other party without a finding that the United States Attorney is unable to act. Those cases are clearly distinguishable and the basis for the distinction is readily to be found in a reading of them. In the oft-cited case of *McCann v. New York Stock Exchange,* 80 F.2d 211 (2d Cir. 1935), Judge L. Hand had occasion to comment upon some differences between criminal and civil contempt in these terms:

> Criminal prosecutions, that is, those which result in a punishment, vindicative as opposed to remedial, are prosecuted either by the United States or by the court to assert its authority. The first are easily ascertainable; they will be openly prosecuted by the district attorney; it would not seem to be of consequence how they are entitled when that is true. In the second the court may proceed *sua sponte* without the assistance of any attorney, as in the case of disorder in the courtroom; there can be little doubt about the kind of proceeding when that is done. *But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence.* There is no reason why he should not do so, and every reason why he should. (emphasis added).

Id. at 214.

Rule 42(b) Fed.R.Cr.P. was intended, in part, to follow the suggestions made in *McCann*. The gloss put upon the language of *McCann* in *Musidor* makes plain the limited circumstance in which the appointment of prosecuting counsel is contemplated. "The practicalities of the situation," said the Court, "where the criminal contempt occurs outside the presence of the court but *in civil litigation* require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt." *Musidor, B.V. v. Great American Screen,* 658 F.2d 60, 65 (2d Cir. 1981) (emphasis added).

The other arguments advanced by the Applicants either do not warrant extended discussion or will be noted hereafter.

II.

During the days of anguish over which the Watergate affair extended, a motion to intervene for the limited purpose of applying for the appointment of a Special Prosecutor was filed in the United States District Court for the District of Columbia. The appointment of a special prosecutor was sought to investigate the events surrounding the notorious Watergate break-in. The novelty of the motion was succinctly noted in the order of Judge Charles R. Richy denying it, as follows: ". . . there is no statute under our Federal System which authorizes this Court to appoint a special prosecutor. Such statutory authority as exists applies only to the authority of the Attorney General of the United States to appoint 'special attorneys' in the exercise of his discretion. 28 U.S.C. 515, and . . . . Petitioners have cited no federal case law which directly supports their proposition that this Court has the inherent power to appoint a special prosecutor in this action." Findings of Fact and Order, *O'Brien v. The Finance Committee to Re-Elect the President, et al.*, Civ. No. 1233-72 (D.D.C. Sept. 25, 1972). A motion for similar relief was subsequently filed by John F. Banzhaf III and Peter H. Meyers in *United States v. Liddy,* and similarly denied by Judge John J. Sirica with a terse "there exists no basis upon which petitioner's motion might be granted." *United States v. Liddy,* Crim. No. 1827-72 (D.D.C. November 21, 1972). Although in each case the judge simply found no basis upon which the requested relief could be granted, there were considerable bases upon which the denial of such relief could rest. The variety of reasons advanced for denying such relief will be briefly discussed.

A. *Absence of Statutory Authority*

It is beyond dispute that there is no federal statute providing for the appointment of a special prosecutor or independent counsel in a case of this sort.

In 1978 Congress enacted 28 U.S.C. §§ 591-598, known as the Ethics in Government Act. That Act defines with meticulous specificity the circumstances under which a special prosecutor may be appointed by a division of the Court established for that purpose by 28 U.S.C. §49. The facts prompting this application are not embraced by the Ethics in Government Act which is, therefore, not applicable here. The enactment of that legislation, however, suggests a different view of the inherent power of federal courts than that advanced by the applicant. If the power to appoint special prosecutors were inherent, then it would seem that the Ethics in Government Act was superfluous.

Little, if any, reliance can be placed upon 28 U.S.C. §547(1) which provides that "each United States Attorney . . . *shall* (1) prosecute for all offenses against the United States; . . ." (emphasis added). The language of that statute "has never been thought to preclude the exercise of prosecutorial discretion." *Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375 (2d Cir. 1973). That case raised the question of whether the federal judiciary should, at the instance of victims, compel federal and state officials to investigate and prosecute persons who allegedly violated federal and state criminal statutes. The question was answered in the negative.

B. *Separation of Powers*

Article II, section 1 of the United States Constitution vests the executive power in the President of the United States who, in section 3, is directed to "take care that the

laws be faithfully executed, . . ." The Attorney General is the alter-ego of the President in taking care that the laws be faithfully executed. *Ponzi v. Fessenden,* 258 U.S. 254, 262, 42 S.Ct. 309, 311, 66 L.Ed. 607 (1922). Neither the Congress in Article I nor the courts in Article III are directed or empowered to enforce the laws. That fundamental principle of separation of powers has been affirmed in numerous federal decisions in a variety of contexts. One of the most frequently cited is *United States v. Cox,* 342 F.2d 167 (5th Cir. 1965), in which the question presented was whether a United States Attorney could be judicially compelled to sign an indictment returned by a grand jury. At page 171, the court said:

> Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."

The law in this circuit supports that view, adopting that reasoning in *Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375, 379 (2d Cir. 1973).

In *Newman v. United States,* 382 F.2d 479 (D.C.Cir. 1967), the United States Attorney consented to a guilty plea tendered by one co-defendant for a lesser included offense under indictment while refusing to consent to the same plea by the defendant who contended that he was thus denied his constitutional rights of due process and

equal protection. Chief Justice (then Circuit Judge) Burger wrote:

> In the United States Attorney's capacity as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment . . . . It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oath; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.
>
> The remedy lies ultimately within the establishment where power and discretion reside. The President has abundant supervisory and disciplinary powers —including summary dismissal—to deal with misconduct of his subordinates; it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.
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> The concurring opinion would reserve judicial power to review 'irrational' decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our own limits, recognizing that we are neither omnipotent so as to have our mandates run without limit, nor omniscent so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the 'laws are faithfully executed' and the responsibility must reside with that power.

Newman v. United States, supra, at 481, 482 n. 9.

C. *Prosecutorial Discretion*

> . . . federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made.
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> * * *
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> This judicial reluctance to direct federal prosecutions at the instance of a private party asserting the failure of United States officials to prosecute alleged criminal violations has been applied even in cases . . . where, . . . serious questions are raised as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the justice system.

Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973). The court went on to consider at 380-381 the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute and concluded that "On balance, we believe that the substitution of a court's decision to compel prosecution for the United States Attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith, . . . would be unwise." *See also, Pugach v. Klein,* 193 F.Supp. 630, 635 (S.D.N.Y. 1961).

The Applicants would distinguish the cases in which a federal court was petitioned to coerce the prosecutor to in-

stitute an investigation or to pursue a criminal prosecution. They argue that they are not seeking such relief. They merely ask that the United States Attorney be supplanted by the appointment of an independent counsel who, in this case, "would be an aid to the public prosecutors in 'carrying out their responsibilities, because it would relieve them of an undesirable and unseemly conflict of interest.' "[4] That argument is not persuasive.

In *Nathan v. Smith,* 737 F.2d 1069 (D.C. Cir. 1984), the District Court granted plaintiff's motion for summary judgment in a mandamus action and ordered the Attorney General to conduct a preliminary investigation pursuant to 28 U.S.C. §592 of the Ethics in Government Act. The Attorney General sought reversal of the court's order and the plaintiff cross-appealed from the court's refusal to direct the Attorney General to apply for the appointment of a special prosecutor (now independent counsel). The order of the District Court was reversed. The concurring opinion by Judge Bork is relevant and instructive. He wrote, at 737 F.2d 1079 as follows:

> It may be thought that neither the relief granted by the district court nor that sought by the plaintiffs

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[4]*See,* Memorandum of Points and Authorities in Support of Application for Appointment of Independent Counsel, p. 19.

The principal reason advanced in support of this application, buttressed by the affidavits of qualified commentators on professional responsibility, is the conflict of interest which allegedly infects the relationship between the United States Attorney and the informant, Mario Montuoro. In paragraph numbered 12 of the Application for Appointment of Independent Counsel, the court is asked to consider the appointment of the attorneys representing Ronald A. Schiavone and the Schiavone Construction Company in this proceeding. I am puzzled by the absence of conflict of interest a request to consider their appointment clearly implies. *See, e.g.,* The Outmoded Concept of Private Prosecution, 25 American U.L.R. 754, 768, *et seq.* (1976). *See also* page 29 of the transcript.

falls within the principle of Executive control of decisions to prosecute. The district court ordered the Attorney General to initiate a preliminary investigation; the plaintiffs seek to compel an application for the appointment of an independent counsel. The distinction between these remedies and the principle [of Executive control of decisions to prosecute] has no significance, however . . . . The preliminary investigation is thus the first stage of the prosecutorial process and the district court has undertaken to control that stage.

Plaintiffs would have the district court control the next stage as well ordering the Attorney General to apply to the special division of the court for the appointment of an independent counsel. It is no answer to say that the courts, under either form of relief, would not control the final prosecutorial decision since that would be made by the independent counsel. There are at least two flaws in that reasoning. The first is that the principle of Executive control extends to all phases of the prosecutorial process. Thus, were this a case about an ordinary prosecution under a federal criminal statute, a plaintiff could not escape the principle discussed by demanding only an order that the Attorney General present facts to a grand jury but leaving the decision whether to sign an indictment to him. Second, if private plaintiffs have the legal ability to require an investigation of criminal charges, it is difficult to understand by what principle they could be denied a cause of action to compel the independent counsel to prosecute if that counsel had sufficient evidence to do so under the policies of the Department of Justice, which the Act requires him to follow . . . . If the execution of

> the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control.

Given the views expressed regarding the merits of this application, no useful purpose would be served by burdening this decision further with a consideration of the issue of standing. *See e.g., Linda R.S. v. Richard D,* 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1972); *Dohaish v. Tooley,* 670 F.2d 934 (10th Cir. 1982); *Pugach v. Klein,* 193 F.Supp. 630, 635 (S.D.N.Y. 1961).

For the foregoing reasons, the Application for the appointment of independent counsel is denied.[5]

SO ORDERED.

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[5]By letter dated October 31, 1984 and received by the Court on November 2, 1984 (argument on the application was heard on October 26, 1984), Applicants' counsel claims surprise by the suggestion of the Governments attorneys upon oral argument that the factual premise of the application was being challenged. Relying upon his understanding of the Government's oral presentation, he writes: "Apparently, Mr. Larkin's contention is in two parts: first, that the Special Prosecutor did not determine that Mario Montuoro had committed perjury; second, that even if the Special Prosecutor determined that Montuoro had committed perjury, the Special Prosecutor decided, on the merits, that prosecution was nevertheless unwarranted . . . .

"One might suggest a number of explanations for the fact that Mr. Silverman made no referral to the Department of Justice, but speculation would be inappropriate and is unnecessary. At the hearing Mr. Larkin was granted leave to supplement the record, belatedly, in this regard. We respectfully submit that fairness requires that Applicant be granted a similar right.

"Applicant then requests leave of the court to supplement the record by a brief deposition of Mr. Silverman, an affidavit from him, or simply by a letter from him to the Court, responding to the following questions:

(Footnote continued on following page.)

(Footnote continued.)

"1. Whether he concluded that Mario Montuoro made false statements to Federal Agents and/or committed perjury before the Grand Jury with respect to the President's allegations?

"2. If so, why he refrained from referring the evidence of Montuoro's false statements and/or perjury to the Department of Justice?"

At the conclusion of oral argument, the Attorney for the Government offered to furnish the Court and counsel with page 294 of Vol. I of the Report of the Special Prosecutor. To date, that page has not been furnished and the record has not been supplemented by the Government. In any event, in the light of the reasons advanced for the denial of the application, I fail to see the relevance of Mr. Silverman's responses to the proposed questions. They would not affect the principle of separation of powers, prosecutorial discretion nor cure the absence of statutory or judicial authority for the relief requested. The belated request by the Applicant for leave to supplement the record by a limited inquiry of Leon Silverman, Esq., is denied.

I express no view as to whether independent counsel could himself have initiated and conducted the prosecution of Montuoro for perjury, assuming such action was warranted. *See, e.g.*, 28 U.S.C. §§ 593(b), 594(a)(9)(e), (f); 1978 U.S. Code Cong. & Ad. News 4216, 4280-4286; 1982 U.S. Code Cong. & Ad. News 3537, 3538, 3545, 3550-3553. If the independent counsel could have initiated and conducted such a prosecution, then the cases discussed pertaining to prosecutorial discretion and separation of powers are clearly dispositive.

Application Affidavit of David T. Austern.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter of an Application for Appointment of Independent Counsel

DAVID T. AUSTERN makes the following statement, under penalty of perjury, as an expert witness on lawyers' professional ethics.

1. My name is David T. Austern. I am an attorney and partner in the Washington, D.C. law firm of Goldfarb, Singer & Austern. I am admitted to practice in the states of New York and Indiana, the District of Columbia, and before a number of federal courts including the Supreme Court of the United States.

2. I have qualified as an expert on legal ethics in federal and state proceedings. In part, my qualifications are based on the following:

(a) For the past ten years, I have been Adjunct Professor of Law at the Georgetown University Law School where I have taught a course entitled Professional Responsibility and The Administration of Justice. Essentially,

this is a legal ethics course, but one which focuses on legal ethics and its impact on the criminal justice process. I teach two sections of this course during the Fall Semester, and one section during the Spring Semester. During three of the past five years, I have also been a Lecturer in Law at the American University Law School where I have also taught legal ethics.

(b) On many occasions during the past ten years I have conducted Continuing Legal Education courses on behalf of the District of Columbia Bar, the Federal Bar, and the American Bar Association.

(c) On a monthly basis, I write a column on legal ethics which appears in *Trial*, the magazine of the American Trial Lawyers' Association. In addition, I am a member of the Board of Editors of the Bureau of National Affairs (BNA) Lawyers' Manual on Professional Conduct.

(d) I served as the first Bar Counsel to the District of Columbia Board on Professional Responsibility. Later, I served a three year term as a member of the Board. I have also been a member of the Legal Ethics Committee of the District of Columbia Bar.

(e) Approximately one-third of my private practice is devoted to representing attorneys accused of unethical behavior or malpractice.

3. For eight years I served as a prosecutor at both the local and federal level. From 1964 to 1967 I was an Assistant District Attorney in the New York County District Attorney's Office. For two years while in New York, I was assigned to the Rackets Bureau, and worked on the investigation and prosecution of organized crime cases.

From 1967 to 1972 I was an Assistant United States Attorney in the United States Attorney's Office in the District of Columbia. While in that office, I was Chief of the Grand Jury/Intake Unit and also Chief of Felony Trials. Between April of this year and the date of this affidavit, I have served (part-time) as Deputy Independent Counsel in the Investigation of the Appointment of Edwin Meese To Be Attorney General.

4. I received a B.A. from the University of Pennsylvania in 1961, and an LL.B. from Yale University in 1964.

FACTS

5. My opinion is based upon the following statement of facts, which I assume to be true in expressing this opinion.

[The facts set forth in paragraphs 6 through 13 are provided in substance in the Affidavit of James P. Manak, *infra,* pp. 54a-56a.]

14. Conflicts of Interest on the part of a prosecutor are proscribed in two ABA rules: in both, the ABA Standards Relating to the Prosecution Function (Standard 3-1.2) and the Code of Professional Responsibility (Canon 9 and Canon 5), a prosecutor must avoid both the appearance and the reality of a conflict of interest. Frequently, lawyers view conflict of interest issues as concerning only those who are in the private practice of law or former government attorneys who work in the private sector. However, the Conflict of Interest rules of the Code apply to all lawyers; prosecutors are not an exempt class.

15. The conflicts of interest in the facts set forth above are numerous and self-evident. First, there is the conflict between a cooperative informant and the prosecutor; the prosecutor will be extremely reluctant to recommend an indictment for an alleged perjurious statement against an informant with whom the prosecutor has been working.

Second, there is the institutional conflict: if the prosecutor's informant is indicted—regardless of whether an objective observer would understand the necessity for the charge—potential informants will be less willing to cooperate now and in the future. Third—and less obvious to a person who has never had prosecution experience—is the management or audit conflict. An indictment of a prosecutor's informant is an admission by the prosecutor that valuable law enforcement resources have been wasted in the time, money, and effort spent on the case which the perjurious informant presented. Inevitably, someone must ask the prosecutor why he or she did not recognize the informant's story for what it was, namely, a lie. It is this reluctance on the part of the prosecutors to underscore their own mistakes by indicting the informant upon whom they relied that presents the most serious conflict of interest.

16. As Watergate and a host of other Special Prosecutor (now called "Independent Counsel") investigations have taught—including the one on which I am now working—a prosecutor truly independent of the Department of Justice is the appropriate person to resolve the ethical conflict in the case at hand.

I STATE, under penalty of perjury, that the foregoing is true and correct.

Respectfully submitted,

DAVID T. AUSTERN

August 24, 1984

Application Affidavit of Barbara Allen Babcock.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter of an Application for Appointment of Independent Counsel

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BARBARA ALLEN BABCOCK submits the following statement, under oath, as an expert witness on lawyers' professional ethics.

1. I am a Professor of Law at Stanford Law School, where I have taught since 1972. I have taught courses in professional responsibility, and have also dealt with lawyers' ethics extensively in my courses in civil and criminal procedure.

2. I am a member of the Maryland and the District of Columbia bars.

3. Before joining the Stanford faculty, I practiced criminal law in the District of Columbia for eight years. For two years I was associated with Edward Bennett Williams, and for six years I was a staff attorney and then Director of the Public Defender Service in the District of

Columbia. For two and a half years on leave from Stanford Law School, I was Assistant Attorney General in the Civil Division of the United States Department of Justice (1977-79). These experiences in practice gave me considerable opportunity to observe the operation of prosecutors' offices and of the Department of Justice.

4. I have written about professional ethics in a number of publications and speak on the subject regularly. I have been a member of the Criminal Justice Council of the ABA and of the ABA Special Committee on Discovery Abuse.

5. I have been a member of the Board of the National Legal Aid and Defender Association, and am presently on the Board of the National Institute for Trial Advocacy.

6. I have consulted as an expert witness on professional responsibility in three matters, none of which have concluded in trial, but two of which required my sworn testimony on deposition and interrogatories.

7. I received a B.A. from the University of Pennsylvania in 1960, and an LL.B. from Yale University in 1963.

Facts

8. My opinion is based upon the following statement of facts, which I assume to be true in expressing this opinion.

[The facts set forth in paragraphs 9 through 16 are provided in substance in the Affidavit of James P. Manak, *infra*, pp. 54a-56a.]

17. Prosecutors clearly cannot attack every instance of alleged criminal conduct that comes to their attention. This is a matter both of limited resources and judgment about how the criminal justice system should operate. Courts afford a wide area for the exercise of prosecutorial discretion, particularly in investigating and charging offenses. See e.g., *Newman v. United States* 382 F.2d 479, 480-82 (D.C. Cir. 1967); *United States v. Cox* 342 F2d 267, 170-72 (5th Cir. 1965). But in the last decade, there has been increasing recognition of the fact that decisions to prosecute should not always be left to the public official in charge because there may be conflicts of interest preventing that official from fairly exercising his considerable discretion. This recognition was the basis for the federal legislation, and its state analogues, requiring that in certain instances a special prosecutor be appointed.

18. The concern about prosecutorial conflicts of interest applies both to the "appearance or reality" of such a conflict. ABA Standards Relating to the Prosecution Function, 1.2.

19. The facts as set out in paragraphs 8-16 above represent an appearance of conflict, and if true, would also provide conflict in reality. Prosecutors are reliant on their informants and must usually promise favors in terms of dropped or declined charges in return for information and almost always in return for testimony. If a prosecutor were to charge an informant with perjury or related offenses for giving false testimony under oath, it would be more difficult in the future for that prosecutor to obtain informant testimony because his reputation for protection of informants would be undermined. And, of course, such

a charge would make it impossible to use the particular informant again. The failure to charge Montuoro appears at least, and may actually be, an example of the prosecutor's protecting his informant.

20. The most reasonable solution to the appearance of unfairness in this instance is to appoint a special prosecutor who is not burdened with institutional concerns about the protection of informants and the office's reputation for doing so.

BARBARA ALLEN BABCOCK
Professor of Law
Stanford Law School

State of California
County of Santa Clara ss.

On this the 16th day of August 1984, before me, Zelda McDonald, the undersigned Notary Public, personally appeared Barbara Allen Babcock, personally known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed it.

WITNESS my hand and official seal.

ZELDA McDONALD
Notary's Signature

Official Seal
Zelda McDonald
Notary Public—California
Santa Clara County
My comm. expires Nov 11, 1985

Application Affidavit of Samuel Dash.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter of An Application for Appointment of Independent Counsel.

Samuel Dash, submits the following statement, under penalty of perjury, as an expert witness on lawyers' professional ethics.

1. My name is Samuel Dash. I am a Professor of Law and Director of the Institute of Criminal Law and Procedure and of the Appellate Litigation Clinic of Georgetown University Law Center. I am presently on sabbatical leave and a Visiting Professor of Law at the University of San Diego School of Law.

2. From 1952-1956 I served as Chief of the Appeals Division, First Assistant District Attorney and District Attorney of Philadelphia, in which positions I frequently passed upon questions of ethics and professional responsibility in the prosecution of criminal cases. From 1958-1963 I practiced law as a criminal defense lawyer and served as President of the National Association of Criminal Defense Lawyers, in which capacity I dealt with questions involving lawyers ethics and professional responsibility in the

defense of criminal cases, and lectured on the subject at meetings of criminal trial lawyers. In 1970-1972 I served as Chairman of the Section of Criminal Law of the American Bar Association and as a delegate to the House of Delegates of the American Bar Association, in which capacities I worked on matters involving lawyers' ethics in the Administration of Criminal Justice.

3. From 1965-1970 I served as Special Consultant to the Advisory Committee on the Prosecution Function and the Defense Functions of the American Bar Association Project on Standards for Criminal Justice. In that capacity I provided a large part of the background material and policy guidelines for the committee and participated in drafting standards of professional conduct for prosecutors and defense lawyers, which were approved by the ABA House of Delegates.

4. I have taught a course in professional responsibility at Georgetown University Law Center for 12 years and have lectured on lawyers' ethics before military lawyers serving in the Judge Advocate Generals' Offices of the Army, Airforce, Marines, and Navy. I have also lectured on lawyers' ethics in programs of the United States Justice Department, the United States Comptroller of the Currency's Office, the ABA, the Bureau of National Affairs, the National Association of Criminal Defense Lawyers, the Judicial Conference of the District of Columbia, and of Judicial Conferences of several United States Courts of Appeals.

5. From 1972-1974 I served as Chief Counsel of the Senate Select Committee on Presidential Campaign Activities (the Senate Watergate Committee), in which capacity I supervised investigations and participated in

public hearings relating in part to lawyers' ethics and professional responsibility in public service in the executive branch of the Federal Government, and drafted the Senate Committee's recommendation for legislation providing for court appointment of an independent counsel to investigate criminal charges against high executive branch officials and to decide whether prosecution is warranted, because of a conflict of interest on the part of the Department of Justice. This recommendation was adopted by the Congress in the Ethics in Government Act.

6. I am a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility, charged with writing formal and informal opinions on lawyers' ethics and professional responsibility.

8. I am admitted to practice in the District of Columbia, Illinois and Pennsylvania.

9. I received a BS degree at Temple University in 1946 and a JD degree at Harvard Law School in 1950.

FACTS

10. My opinion is based upon the following statement of facts, which I assume to be true in expressing this opinion.

[The facts set forth in paragraphs 11 through 18 are provided in substance in the Affidavit of James P. Manak, *infra,* pp. 54a-56a.]

OPINION

19. A prosecutor may exercise discretion not to initiate a prosecution against an individual even when sufficient evidence exists which would support a conviction. This discretion is recognized in the ABA Standards relating to the prosecution function, Standard 3-3.9(b). In that standard a number of factors are listed as guidelines for the exercise of this discretion. However, none of the factors listed in Standard 3-3.9(b) apply to the facts set forth in paragraph 11 through 18 above. Although one of the considerations recognized by this standard is the cooperation of the accused in obtaining the convictions of others, this clearly refers only to lawful cooperation and not to perjury committed by the accused to assist the prosecutor.

20. More applicable to these facts is Standard 3-3.9(c), which provides in pertinent part: "In making the decision to prosecute, the prosecutor should give no weight to . . . a desire to enhance his or her record of convictions." The prosecution of informers for perjury could have a significant negative impact on the prosecutor's record of convictions. Standard 3-3.9(c) refers to a particular conflict of interest on the part of the prosecutor which is more generally covered by Standard 3-1.2. This standard, providing that the prosecutor "should avoid the appearance or reality of a conflict of interest with respect to his official duties", makes it clear that prosecutors must abide by the same ethical principles applicable to lawyers in general which underlie Canons 5 and 9 of the ABA Model Code of Professional Responsibility and Rules 1.7-11 of the ABA Model Rules of Professional Conduct.

21. The refusal to prosecute the informer under the facts set forth in paragraph 11-18 clearly presents the appearance of a conflict of interest, if not a real conflict.

Neither the court nor the public can have confidence in the integrity of this discretionary decision, since it appears that the controlling factor is the prosecutor's concern over the continuing availability and cooperation of informers, rather than his duty to prosecute a specific and serious violation of the law.

22. Although the prosecutor may honestly believe that under the circumstances or the law prosecution would be unfair or improper, because of the conflict of interest, his judgment may be biased, and the public will not credit him with such valid motives for failing to prosecute. In this situation, to avoid the appearance of a conflict of interest, some prosecutors may choose to initiate an improper prosecution. Thus, the harmful effects of leaving the discretion to prosecute with a prosecutor under facts such as are present here include not only the wrongful failure to prosecute where prosecution is merited, but also the wrongful decision to prosecute where prosecution is unmerited.

23. Because of the factors set forth above, a reasonable solution to the probable conflict of interest and obvious appearance of conflict present here would be for the court to appoint a special prosecutor or independent counsel to make an objective and impartial investigation of the allegations that Mario Montuoro committed perjury, and to make the judgment as to whether a prosecution against him is warranted.

I state under penalty of perjury, that the foregoing is true and correct.

September 6, 1984

Respectfully submitted,

SAMUEL DASH

Application Affidavit of Geoffrey C. Hazard, Jr.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

In the Matter of An Application for Appointment of Independent Counsel.

Geoffrey C. Hazard, Jr., submits the following statement, under penalty of perjury, as an expert witness on lawyers' professional ethics.

1. My name is Geoffrey C. Hazard, Jr. I am the Nathan Baker Professor of Law at Yale Law School, and Director of the American Law Institute.

Qualifications As An Expert Witness

2. I have qualified as an expert witness on legal ethics in federal and state proceedings.

3. From 1978-1983, I served as Reporter for the American Bar Association Special Commission on Evaluation of Professional Standards. In that capacity, I was the principal draftsman of the ABA Model Rules of Professional Conduct, which were approved by the ABA House of Delegates in August, 1983.

4. I am the author of *Ethics in the Practice of Law* (1978), and of several articles on Lawyers' Ethics.

5. I have taught a course on Professional Responsibility for several years, and have been a speaker on Lawyers' Ethics at numerous bar association meetings and at law schools throughout the country.

6. I am admitted to practice in California and Connecticut.

7. I received a B.A. at Swarthmore College in 1953, and an LL.B. at Columbia University in 1954.

Facts

8. My opinion is based upon the following statement of facts, which I assume to be true in expressing this opinion.

[The facts set forth in paragraphs 9 through 16 are provided in substance in the Affidavit of James P. Manak, *infra,* pp. 54a-56a.]

Opinion

17. Conflicts of interest on the part of a prosecutor are expressly proscribed by the ABA Standards Relating to the Prosecution Function. Under Standard 3-1.2, a prosecutor must avoid either "the appearance or the reality" of a conflict of interest. That standard is consistent with the principle that justice must not only be done, but must appear to be done.

18. The conflict of interest in the facts set forth in paragraphs 8 to 16 above arises from a practical concern of the prosecutor's office. If a cooperative informant is subsequently indicted for testimony given on behalf of the prosecution (even though the testimony is perjurious),

other potential informants might be less willing to cooperate. On the other hand, there would be serious injustice if government witnesses were to have a de facto license to perjure themselves in prosecutions against fellow citizens.

19. A reasonable solution for the conflict of interest described above would be for the court, in its discretion, to appoint a special or independent prosecutor to investigate the allegations of perjury by Mario Montuoro, and to make the judgment as to whether prosecution against him is warranted.

I STATE, under penalty of perjury, that the foregoing is true and correct.

August 25, 1984

Respectfully submitted,

GEOFFREY C. HAZARD, JR.

Application Affidavit of Norman Lefstein.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTICT OF NEW YORK

In the Matter of an Application for Appointment of Independent Counsel

NORMAN LEFSTEIN submits the following statement, under penalty of perjury, as an expert witness on the professional ethics of attorneys.

1. My name is Norman Lefstein. I am a Professor of Law at the University of North Carolina School of Law, Chapel Hill, North Carolina. I have been a Law Professor at North Carolina since 1975. I also have served as a Visiting Law Professor at the Duke Law School, Durham, North Carolina, and have been an Adjunct Law Professor at Northwestern University School of Law, Chicago, Illinois, and at the Georgetown University Law Center, Washington, D.C.

2. The subjects that I have regularly taught since 1975 include Professional Responsibility, Criminal Law, Criminal Procedure, and Trial Advocacy. I also have several times taught a Seminar on Professional Responsibility in the Prosecution and Defense of Criminal Cases.

3. Since 1977, I have been a Reporter for the American Bar Association's Standing Committee on Criminal Justice Standards. As part of my work in this position, I

served as the principal draftsman for the second edition of American Bar Association Standards Relating to the Prosecution and Defense Function Standards, chapters three and four, published in 1981. I also prepared a first supplement to the ABA Prosecution and Defense Function Standards, which was published in 1982, and I am currently completing a second supplement to these two chapters, scheduled to be completed this fall. I also have published law review articles that have dealt with ethical issues in criminal cases.

4. I have spoken publicly about professional ethics on a number of occasions. During February 1984, for example, I spoke at the ABA Midyear Meeting on "Foreseeing Ethical Problems in Criminal Cases." I also have lectured numerous times on professional ethics at bar review courses in Georgia and North Carolina.

5. I am a member of the Editorial Board of the American Bar Association/Bureau of National Affairs Lawyers' Manual on Professional Conduct.

6. I have participated as an expert witness in Kentucky, New York, North Carolina, and Washington, D.C., in cases involving professional responsibility and the performance of lawyers.

7. I am currently Vice-Chairperson of the American Bar Association Criminal Justice Section. During 1983-84, I served as the Section's Secretary. I have been a member of the Criminal Justice Section's Governing Council since 1979, and a member of the Criminal Justice Section's Committee on Ethical Considerations in the Prosecution and Defense of Criminal Cases since 1980.

8. I received my LL.B. from the University of Illinios College of Law in 1961. During 1963-64, I was an E. Barrett Prettyman Fellow in Trial Advocacy at the Georgetown University Law Center. I received the LL.M. degree from Georgetown in 1964.

9. My legal experience prior to entering law teaching includes the private practice of law, and service as an Assistant United States Attorney in Washington, D.C., and as Director of the D.C. Public Defender Service. I am a member of the District of Columbia and Illinois bars.

Facts

10. My opinion is based upon the following statement of facts, which I assume to be true in expressing this opinion.

[The facts set forth in paragraphs 11 through 18 are provided in substance in the Affidavit of James P. Manak, *infra*, pp. 54a-56a.]

Opinion

19. Prosecutors, like all other attorneys, must avoid conflicts of interest. Not only are conflicts of interest proscribed by codes of responsibility in every state, but the subject is also specifically dealt with in the American Bar Association Standards Relating to the Prosecution Function, § 3-1.2 (2d ed. 1980): "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties."

20. The facts set forth in paragraphs 10-18 indicate that there is both the appearance and reality of a conflict of interest in the United States Attorney deciding whether to

prosecute Mario Montuoro. The nature of this conflict arises from several practical considerations. First, the decision to prosecute Montuoro would embarrass the United States Attorney's office and cast doubt on the judgment of prosecutors who previously relied on Montuoro's representations. Also, if criminal charges were brought against Montuoro, the United States Attorney could never again use him as a witness for the government in other cases. Prosecution of Montuoro, moreover, would undoubtedly discourage other potential witnesses from serving as government informants. Finally, Montuoro's prosecution for perjury could cast doubt upon the criminal conviction in which he earlier testified as a government informer, and could conceivably result in a collateral attack on that conviction.

21. The American Bar Association Standards Relating to the Prosecution Function, § 3.9, list a variety of factors that may properly be considered by a prosecutor in deciding whether to institute criminal proceedings, such as the prosecutor's reasonable doubt that the accused is guilty. However, § 3.9 presupposes that the process of deciding whether to institute charges is unfettered by the kinds of extraneous considerations outlined in paragraph 20.

22. Although § 3.9 lists "cooperation of the accused" as a factor to be considered in deciding whether to prosecute, this refers to a situation in which the accused has previously furnished, or is prepared to furnish, reliable and truthful information. Where the issue, as in Montuoro's case, is whether the witness has supplied false information and has testified untruthfully, the accused's "cooperation" should be immaterial as a discretionary factor.

23. The National Prosecution Standards, § 3.2 (1977), promulgated by the National District Attorneys Association, urges the exercise of prosecutorial "discretion to petition the court to assign a special prosecutor in cases where recognizable or potential conflicts of interest exist in the prosecuting attorney's opinion." Here, the United States Attorney has not petitioned for the appointment of a special prosecutor to investigate allegations of perjury by Montuoro. Indeed, with respect to such a petition in the present case, the United States Attorney is burdened by the same conflict of interest described in paragraph 20.

24. A reasonable solution, therefore, would be for the court to appoint a special or independent prosecutor to decide whether prosecution of Montuoro is appropriate.

I, STATE, under penalty of perjury, that the foregoing is true and correct.

Respectfully submitted,

NORMAN LEFSTEIN

August 31, 1984

Application Affidavit of James P. Manak.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

In the Matter of an Application for Appointment of Independent Counsel

JAMES P. MANAK, submits the following statement, under penalty of perjury, as an expert on the professional ethics of prosecuting attorneys.

1. My name is James P. Manak. I am senior counsel at The Traffic Institute, Northwestern University, Evanston, Illinois, and Instructor, Illinois Institute of Technology, Chicago-Kent College of Law. I have been on the staff of Northwestern University and Chicago-Kent College of Law since 1980. I have also served as Assistant Professor of Law, Director of Clinical Programs, under a grant from the Council on Legal Education and Professional Responsibility (legal aid and prosecution clinics) and as Lecturer at law, at the State University of New York at Buffalo.

2. The subjects that I have regularly taught since 1968 in the above institutions, as well as for various state and national law enforcement agencies and associations, include prosecution and defense legal ethics as part of law school clinical programs, criminal law and procedure for police and prosecutors, and legal research and writing.

3. From 1974-1978 I was the Director of the Standards and Goals Division of the National District Attorneys

Association (NDAA), in which capacity I was responsible for all phases of the development and implementation of the National Prosecution Standards.

4. From 1973-1977 I was the Reporter for the Prosecution Volume, Juvenile Justice Standards, American Bar Association/Institute for Judicial Administration, in which capacity I was responsible for various drafts and the final version of the Prosecution Volume adopted by the American Bar Association House of Delegates.

5. From 1975-76 was a consultant to the National Advisory Committee for Juvenile Justice and Delinquency Prevention, and in that capacity I was responsible for various drafts and final version of the Prosecution Function Volume.

6. I have been general counsel for Americans for Effective Law Enforcement, Inc. (AELE), since 1978, and in that capacity have participated in numerous amicus curiae briefs before the U.S. Supreme Court and various state and federal courts on behalf of many law enforcement groups including the National District Attorneys Association, the International Association of Chiefs of Police (IACP), and the National Sheriffs Association.

7. Since 1967 I have been a consultant to the National District Attorneys Association as an editor of the *Prosecutor,* their quarterly magazine, and *Case Commentaries and Briefs,* their monthly case law digest. I currently own and publish two reference works for police and prosecutors, *Illinois Law of Criminal Investigation* (annual supplement since 1971; Second Edition in preparation) and *Law Enforcement Legal Defense Manual* (published quarterly since 1973), and have recently co-authored the

Fourth Edition of the casebook, *Criminal Law and Its Administration* (Foundation Press, August 1984) with Professor Fred E. Inbau, Gov. James R. Thompson, and Illinois Department of Law Enforcement Director James Zagel.

8. I am a member of, and have held offices in, various state and national professional organizations including NDAA, AELE, IACP and the Advisory Board of the National Defender Institute assigned counsel program.

9. I received my LL.B. from the State University of New York at Buffalo in 1964, where I was Editor-in-Chief of the Law Review, and an LL.M. from Northwestern University School of Law in 1969, where I was a Ford Foundation Fellow, Police Legal Advisor Program.

10. My legal experience has included private practice in New York and Illinois, legal aid representation (Erie County, N.Y., Legal Aid Bureau), prosecution (Special Assistant, Erie County, N.Y., District Attorney), and police legal advisor (Buffalo, N.Y.). I am admitted to practice in N.Y., Illinois, U.S. Supreme Court, U.S. District Court for the Western District of New York, and the U.S. Court of Appeals, Tenth Circuit.

Facts

11. My opinion is based upon the following statement of facts, which I have been given and assume to be true in expressing this opinion.

12. Mario Montuoro has an established relationship with the United States Department of Justice as an informer. For example, in 1981, Mr. Montuoro was a

government witness in an organized crime case in which the defendant was convicted.

13. Montuoro's cooperation with the Justice Department might have stemmed from motives of revenge against people about whom he has given information, and/or from a desire to ingratiate himself with the prosecutor's office. Although there is no public record of recent criminal conduct by Montuoro, his criminal record includes four arrests, including one in 1969 for possession of heroin, and one in 1974 for possession of a gun.

14. Montuoro told members of the Federal Organized Crime Strike Force in Brooklyn that Raymond J. Donovan and Ronald A. Schiavone, as officers of Schiavone Construction Company, were guilty of participating in an illegal cash payment to a union officer. The payment was said to have been made at a luncheon at Prudenti's Restaurant in May or June of 1977.

15. In 1981, Raymond J. Donovan became Secretary of Labor of the United States. Later the same year, a division of the United States Court of Appeals for the District of Columbia Circuit appointed Leon Silverman Special Prosecutor, expressly to investigate the Prudenti's allegation that had been made by Montuoro.

16. Under an Order of the United States District Court for the Eastern District of New York, Montuoro testified before a grand jury, and repeated the Prudenti's allegation. The grand jury unanimously returned a no true bill on that allegation.

17. After an exhaustive investigation of Montuoro's allegation, the Special Prosecutor found that Montuoro's

specifications of dates were "inconsistent," that his attempts to relate the luncheon to other events "proved to be illusory," and that there is "no evidence corroborating Montuoro's assertion that any Prudenti's lunch attended by Messrs. Donovan DiCarolis, Schiavone, Liguori, Sanzo, and Montuoro himself occurred at or near the time he alleged or, for that matter, at any other time examined in the course of this investigation." In short, the Special Prosecutor concluded that "no credible evidence exists that a luncheon was alleged by Montuoro ever occurred."

18. Montuoro's conduct, as described in the preceding paragraphs, would justify indictments against him for several federal crimes, including Perjury (18 U.S.C. 1621), False Declaration before a Grand Jury (18 U.S.C. 1623), False Statements (18 U.S.C. 1001), Obstruction of Justice (18 U.S.C. 1505, and/or Contempt (18 U.S.C. 401).

19. It is recognized by accepted standards, ABA, Standards Relating to the Prosecution Function, Sec. 3-1.2 (2d Ed., 1980) and NDAA, National Prosecution Standards, Sec. 3.2 (1977), that prosecutors must avoid not only actual conflicts of interests but also the appearance of a conflict of interest.

20. Section 3.2 of the National Prosecution Standards provides that the "[p]rosecuting attorney shall have the discretion to petition the court to assign a special prosecutor in cases where recognizable or potential conflicts of interest exist in the prosecuting attorney's opinion." The Commentary to this standard (p. 45-46) states that "'[t]he assignment of a special prosecutor to act in cases where the regular prosecutor may be compromised is an accepted practice . . . [and] . . . [p]etition to the court for appointment of a special prosecutor may be made either by the

state's attorney or by a private citizen." The NDAA standards and commentary urge prosecutors to seek the appointment of a special prosecutor in cases of real or apparent confict of interest; recognize the ability of private citizens such as Schiavone to do the same; and recognize the inherent power of courts to appoint special prosecutors in such cases.

21. In my opinion the facts set forth in paragraphs 11-18 indicate that there is both the reality and appearance of a conflict of interest in the United States Attorney deciding whether to prosecute Mr. Montuoro. The decision to prosecute Montuoro would embarrass the United States Attorney's office and cast doubt on the judgment of prosecutors who previously relied on Montuoro's representations. It would raise the inevitable question of why the U.S. Attorney relied upon the representations of a witness whose credibility has been seriously undermined by subsequent investigations. If criminal charges were brought against Montuoro, the United States Attorney could never again use him as a witness for the government in other cases. Prosecution of Montuoro would also undoubtedly discourage other potential witnesses from serving as government informants, and Montuoro's prosecution for perjury could cast doubt upon the criminal conviction in which he earlier testified as a government informer, and could conceivably result in a collateral attack on that conviction.

22. In my opinion the purpose and intent of the NDAA standards and commentary cited, as well as Sec. 3-1.2 of the ABA standards, is to avoid this reality and appearance of conflict of interest, by the prosecutor's exercise of discretion in seeking the appointment of a special prosecutor, or in the absence of a petition by the prosecutor

himself to that effect, by the court exercising its inherent powers to appoint a special prosecutor upon the petition of private citizen Schiavone or his legal representative.

23. In my opinion the appointment of a special prosecutor in this case to consider prosecution of Montuoro will aid the present prosecutor in carrying out his responsibilities, will relieve his office of the reality and appearance of a conflict of interest, and is recommended by the National Prosecution Standards, as promulgated by the national professional organization of prosecutors, as the recognized and acceptable manner of balancing the interests of all concerned.

I STATE, under penalty of perjury, that the foregoing is true and accurate.

Respectfully submitted,

JAMES P. MANAK

September 13, 1984